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No. 08-991

In The Supreme Court of the United States

FRANKIE WHITE, et al.,
Petitioners,

v.

THE COCA-COLA COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether an administrator of an ERISA plan that pays benefits from a periodically funded irrevocable trust is subject to the same conflict of interest as an administrator that pays benefits under its ERISA plan directly from the corporate coffers with an immediate impact on the company's profits.

2) Does the presence of a choice of law provision in an ERISA plan document require the application of a state law canon of contract interpretation that conflicts with the uniformly recognized application of the same canon under the federal common law of ERISA?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent The Coca-Cola Company is the parent company. The Coca-Cola Company has hundreds of domestic and foreign consolidated subsidiaries. All of the consolidated subsidiaries are wholly-owned and none are publicly traded. The Coca-Cola Company's stock is publicly traded (NYSE: KO).

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STATEMENT OF THE CASE

I. The Plan

This case involves the interpretation of The Long Term Disability Income Plan of The Coca-Cola Company, an ERISA-governed welfare benefit plan sponsored by The Coca-Cola Company. Coca-Cola funds the Plan through periodic, irrevocable payments to the Trust Forming a Part of The Coca-Cola Company Long Term Disability Income Plan.[1] The Trust qualifies as a Voluntary Employees' Beneficiary Association ("VEBA") under the Internal Revenue Code.[2] In accordance with the deduction limitations imposed by the Code, Coca-Cola makes contributions to the Trust in amounts and at intervals recommended by an actuary.[3] Plan benefits are paid exclusively from the Trust.[4]

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[1] R2-20-Gilbreath Aff. ¶ 11; R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 5.4; R2-20-Gilbreath Aff. Ex. 8 §§ 8.02, 11.11; *see* 26 U.S.C. § 501(c)(9). Effective January 1, 2003, Coca-Cola changed the Plan's funding mechanism to an insurance policy. But for Plan participants like Petitioners, who both became disabled before January 1, 2003, Plan benefits are paid from the Trust.

[2] R2-20-Gilbreath Aff. ¶ 13; R2-20-Gilbreath Aff. Ex. 9; *see* 26 U.S.C § 501(c)(a).

[3] *See* 26 U.S.C. § 419 (limiting allowable deduction for contributions to VEBA to its "qualified direct costs" and additions to its "qualified asset account," which cannot exceed the amount reasonably and actuarially necessary to fund claims incurred but unpaid as of the close of the plan year.) Petitioners concede that Coca-Cola contributes to the Trust based upon the recommendation of an actuary. (Petition at 2 n.3).

[4] R2-20-Gilbreath Aff. §§ 11-12.

II. The Underlying Allegations

Petitioners Frankie White and Leon Warner brought this case seeking to represent a class of participants whose payments from the Plan were offset to account for their receipt of disability benefits from other sources. Petitioners claimed that the terms of the Plan prohibited any offset.

Section 4.1 of the Plan states that a "Participant who incurs a Disability will receive monthly benefits in an amount equal to 60 percent of his Average Compensation, <u>reduced to account for disability benefits payable from other sources, as required under Section 4.2</u>."[5] Section 4.2, titled "Offset for Other Disability Benefits" (the "Offset Provision"), provides that "the monthly Disability Benefit payable from this Plan to the Participant who receives disability benefits from any source described in [the Plan] <u>will be reduced</u>" to account for a participant's receipt of those disability benefits.[6]

The Plan is intended to protect qualifying Coca-Cola employees against total loss of income while they recover from a disability.[7] It does not provide complete income replacement.[8] The default monthly benefit under the Plan is 60% of a participant's

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[5] R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 4.1 (emphasis added).

[6] *Id.* § 4.2(a) (emphasis added).

[7] R2-20-Gilbreath Aff. ¶ 8.

[8] R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 4.1.

Average Compensation (as defined in the Plan).[9] Many participants who qualify to receive disability benefits payments from the Plan also receive disability benefits from other sources, like Social Security. If so, the amount of disability benefits received from those other sources is deducted from 70% of the participant's Average Compensation, and the Plan pays the difference.[10] The effect of this formula is to increase the participant's total benefits (received from the Plan and the other sources) to a total of 70% of Average Compensation, while preserving Plan assets and avoiding the moral hazard that would occur if the amount of benefits a participant received (from all sources) exceeded the Average Compensation earned while working for Coca-Cola.[11]

The Plan's Summary Plan Description gives a concrete demonstration of how the Plan's Offset Provision works in either situation:

[9] *Id.*

[10] *Id.* § 4.2.

[11] Petitioner White is a ready example of this moral hazard. If the Offset Provision is interpreted to prohibit offsets, as petitioners contend, petitioner White's total monthly disability benefits received (from the Plan and Social Security) would equal over 110% of the monthly Average Compensation he earned while working for Coca-Cola. *See* R2-20-Gilbreath Aff. Ex. 15 at Coca-Cola 000104.

LTD payment example

Suppose your basic monthly pay for disability purposes is $3,000 and you do not receive benefits from other sources.

Here is how your LTD payment is figured:

$ 3,000	Basic monthly pay before disability
x 60%	Maximum LTD pay replacement percentage
$ 1,800	Maximum monthly benefit from the LTD plan

If you begin receiving $750 in monthly Social Security disability payments, your LTD benefit will be reduced as follows:

$ 3,000	Basic monthly pay before disability
x 70%	Maximum pay replacement percentage from all sources
$ 2,100	Total amount of your pay to be replaced by all sources
- [$] 750	Monthly Social Security disability payment
$ 1,350	ACTUAL MONTLY BENEFIT FROM THE LTD PLAN

As the above example shows, the LTD Plan works with Social Security disability payments

> to bring your monthly income to 70% of your basic monthly pay.[12]

Despite this, petitioners claimed that a single clause at the end of the Offset Provision ("and provided further that the offset for other disability benefits will not serve to reduce the Disability Benefit under this Plan to an amount less than 60 percent of the Participant's Average Compensation")[13] absolutely prohibited offsets, no matter what the rest of the Plan provisions say.

III. Procedural Background

Petitioner White submitted that claim to the Plan's administrator, The Coca-Cola Company Benefits Committee, for administrative review.[14] The Plan grants the Committee complete and final discretionary authority to construe the Plan and decide all questions arising under it.[15] After carefully reviewing petitioner White's claim and obtaining an opinion from outside ERISA fiduciary counsel concerning the interpretation of an ambiguous Plan document, the Committee construed the Plan's Offset Provision to permit offsets.[16]

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[12] R2-20-Gilbreath Aff. Ex. 10 at Coca-Cola 000179.

[13] R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. § 4.2(a).

[14] R2-20-Gilbreath Aff. ¶ 26; R2-20-Gilbreath Aff. Ex. 13.

[15] R2-20-Gilbreath Aff. ¶¶ 4-5; R2-20-Gilbreath Aff. Ex. 2 - Plan Doc. §§ 7.2(b)(2)-(3).

[16] R2-20-Gilbreath Aff. ¶¶ 27-30; R2-20-Gilbreath Aff. Exs. 14-17.

On behalf of themselves and a putative class of Plan participants, petitioners filed a suit in the District Court challenging the Committee's interpretation of the Offset Provision. The District Court reviewed the Committee's interpretation and found that it was reasonable. *See White v. The Coca-Cola Company*, 514 F. Supp. 2d 1353 (N.D. Ga. 2007). Because Plan benefits are paid from the Trust, rather than Coca-Cola's operating assets, the District Court applied well-settled Eleventh Circuit law and held that the Committee did not operate under a conflict of interest. *See White*, 514 F. Supp. 2d at 1370 (citing *Buckley v. Metropolitan Life*, 115 F.3d 936, 939 (11th Cir. 1997)). Accordingly, the District Court ruled that the Committee's reasonable interpretation of the Offset Provision was due deference and upheld its decision to deny petitioner White's claim. Petitioners appealed to the Eleventh Circuit, which affirmed the decision that is the subject of the petition for certiorari.

IV. Appellate Proceedings In This Case And The Related Oliver Appeal

When petitioners filed their appeal, another case involving the Plan's Offset Provision was already pending before the Eleventh Circuit: *Oliver v. The Coca-Cola Company*, Appeal No. 05-16509-DD. On August 29, 2007, less than a month after the District Court's decision in this case, a panel of the Eleventh Circuit issued an opinion in *Oliver* ruling that the language of the Plan's Offset Provision prohibited offsets. *See Oliver v. The Coca-Cola Company*, 497 F.3d 1181 (11th Cir. 2007). However, because the Offset Provision had neither been fully litigated in the *Oliver* district court proceeding nor ever presented to

the Committee for an administrative review, Coca-Cola filed a petition for rehearing challenging the *Oliver* panel's ruling on the Offset Provision as premature. Coca-Cola requested that the *Oliver* panel vacate the portion of its order addressing the Offset Provision and stay consideration of that issue pending a determination on a proper administrative and district court record in this case. On November 6, 2007, the Eleventh Circuit granted Coca-Cola's petition, vacated the portion of its opinion addressing the Plan's Offset Provision, and stayed proceedings in *Oliver* pending a ruling on that issue in this case. *See Oliver v. The Coca-Cola Company*, 506 F.3d 1316 (11th Cir. 2007).

On September 10, 2008, the Eleventh Circuit issued its opinion in this case affirming the District Court's rulings that the Committee's interpretation of the Plan's Offset Provision was reasonable and that the Committee did not operate under a conflict of interest. *See White v. The Coca-Cola Company*, 542 F.3d 848 (11th Cir. 2008). In doing so, the Eleventh Circuit followed the District Court's lead and relied on Eleventh Circuit precedents finding the absence of a conflict of interest when benefits are paid from a trust funded with irrevocable contributions. In its opinion, the Eleventh Circuit addressed the effect on circuit precedents of this Court's recent decision in *Metropolitan Life Insurance Co. v. Glenn*, __ U.S. __, 128 S. Ct. 2343 (2008), which Coca-Cola had submitted to the court as supplemental authority before oral argument. Specifically, the Eleventh Circuit recognized that *Glenn* implicitly overruled its precedent addressing how to take account of a conflict of interest in reviewing decisions made by a conflicted decision maker, but appeared to conclude that it did

not alter the analysis of whether a conflict was present. The court commented that "*Glenn* does not alter our analysis unless [the Committee] operated under a conflict of interest." *White*, 542 F.3d at 854. The court noted that Eleventh Circuit "law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits." *Id.* at 858 (quoting *Gilley v. Monsanto Co. Inc.*, 490 F.3d 848, 856 (11th Cir. 2007)). Thus, because the Committee's decision was more than reasonable (the relevant standard of review in the absence of a conflict), the Eleventh Circuit affirmed the District Court.[17] Petitioners filed a petition for rehearing on September 29, 2008, which the Eleventh Circuit denied on November 7, 2008.

In the interim, on October 30, 2008, the Eleventh Circuit's *Oliver* panel had issued a decision remanding that case to the district court for further proceedings consistent with the Eleventh Circuit's ruling in this case that the Offset Provision permitted offsets. *See Oliver v. The Coca-Cola Company*, 546 F.3d 1353 (11th

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[17] Subsequently, in a case involving an ERISA plan like that at issue in *Glenn*, where the insurance company both decided claims and paid benefits from its own assets, the Eleventh Circuit expressly recognized *Glenn* and conformed its law governing plan administrators that pay benefits from their own general assets to *Glenn's* holding. *See Doyle v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1352, 1359 (11th Cir. 2008). Of course, *Doyle* did not call into question the continuing validity of the long line of Eleventh Circuit precedent finding no conflict of interest in the distinct situation here, which did not arise in *Glenn*, of payment of benefits from an irrevocable trust.

Cir. 2008). In its order the *Oliver* panel recognized this case as controlling precedent, but noted that "the district court can still consider whether the [C]ommittee operated under a conflict of interest" on remand because "[t]hough such a conflict was found not to be present in *White*, Oliver might be able to provide evidence of one." *Id.* at 1354. The *Oliver* panel went on to instruct that, "[b]ased on the Supreme Court's recent decision in *Glenn*[], this determination would only be one factor in the court's 'arbitrary and capricious' analysis, and would not necessitate application of a 'heightened arbitrary and capricious' standard," as prior Eleventh Circuit law had required. *Id.*

The remand ordered in the *Oliver* case has, until recently, been delayed by further litigation. On December 3, 2008, Oliver filed a rehearing petition in his case requesting that the Eleventh Circuit resolve what he contends is a conflict between the *Oliver* and *White* opinions. Specifically, Oliver contends the Eleventh Circuit's law is in conflict because "[t]he *Oliver* decision follows the recent U.S. Supreme Court case [*Glenn*] which requires consideration of conflict of interest and which reverses" Eleventh Circuit law that no conflict exists when benefits are paid from a trust, but "[a]t the same time, the *Oliver* decision affirms *White* which affirms the rule [from prior circuit law] that no conflict of interest can exist when benefits are paid from a [t]rust."[18] On March 3, 2009, the *Oliver* panel denied Oliver's petition for rehearing.

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[18] Petition for Rehearing at 7, *Oliver v. The Coca-Cola Company*, Appeal Docket No. 05-16509-DD (11th Cir. Dec. 3, 2008).

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Rule Concerning the Existence of a Conflict of Interest Where ERISA Benefits Are Paid from an Irrevocable Trust Is Not Yet Settled—Even as to Coca-Cola's Plan.

A. The Eleventh Circuit's Law Is Too Unsettled for This Court to Intervene.

Petitioners suggest that the Eleventh Circuit has definitively staked out a position on one side of a multiple circuit division of opinion on the existence of a conflict of interest, and they seek issuance of a writ of certiorari so that this Court can determine whether the funding arrangement of Coca-Cola's Plan gives rise to a conflict of interest. But Eleventh Circuit law is not nearly as settled as petitioners would have it, so much so that the question of whether there is a conflict of interest with respect to Coca-Cola's Plan is still being litigated in the Eleventh Circuit.

In its opinion below, the Eleventh Circuit, after acknowledging that *Glenn* had implicitly overruled prior Eleventh Circuit law concerning how to weigh a conflict of interest once it is determined to exist, noted that *Glenn* did not allow it to disregard binding Eleventh Circuit law holding that the payments of benefits from an irrevocable trust eliminates any inherent conflict of interest. Then, six weeks later, in an two-page opinion remanding *Oliver*, another panel of the Eleventh Circuit noted that, although the *White* panel's decision would generally be binding on the district court, it "can still consider whether the [C]ommittee operated under a conflict of interest"

because "[t]hough such a conflict was not found to be present in *White*, Oliver might be able to provide evidence of one." *Oliver*, 546 F.3d at 1354.

The Eleventh Circuit has declined to address the apparent tension between the decision below and *Oliver*. In *Oliver*, a participant subject to the Offset Provision filed a petition for rehearing contending that there is an intra-circuit split concerning whether this Court's decision in *Glenn* "requires consideration of conflict of interest even though benefits [from Coca-Cola's Plan] are **paid from a Trust**."[19] The *Oliver* panel recently denied the petition, which will result in the remand of the case for further development in the district court of the conflict issue, as it concerns the specific provision of the specific plan at issue in this case. Consequently, the primary issue upon which petitioners here seek review will be further developed—and perhaps clarified—within the Eleventh Circuit as a result of the *Oliver* case. A writ of certiorari is thus premature. Moreover, the current state of Eleventh Circuit law suggests that the existence of a conflict of interest as to the very Plan at issue in this case remains an open question. Although the Eleventh Circuit may eventually clarify matters further, at least the *Oliver* panel appears to view the existence of a conflict concerning Coca-Cola's Plan as an open issue. Because the premise of petitioners' request for a writ of certiorari is that the Eleventh Circuit has reached a definitive conclusion on that open issue, this Court should deny the petition.

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[19] Petition for Rehearing at 8, *Oliver v. The Coca-Cola Company*, Appeal Docket No. 05-16509-DD (11th Cir. Dec. 3, 2008) (emphasis in original).

B. This Court Does Not Grant a Writ of Certiorari to Resolve Intra-Circuit Splits.

Although the rule in the Eleventh Circuit remains unsettled, the rules of this Court for dealing with unsettled and potentially inconsistent intra-circuit law are clear. The Supreme Court does not grant certiorari to resolve intra-circuit splits. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *cf. United States ex rel. Robinson v. Johnston*, 316 U.S. 649, 649 (1942) (identifying *en banc* review as the appropriate means of resolving intra-circuit disputes). Indeed, this Court has long recognized that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski*, 353 U.S. at 902.

The wisdom of this rule is well illustrated here. If the Eleventh Circuit's law concerning conflicts of interests in ERISA plans funded by irrevocable trusts were as clear as petitioners insist, the *Oliver* panel would not have remanded that case to the district court for further development of the conflict issue. But the *Oliver* panel did find such a remand necessary, even after considering the decision in this case, and the fact that one of the circuit judges (Judge Stanley F. Birch, Jr.) served on both panels suggests that the two cases can be harmonized. In any event, the Eleventh Circuit deserves an opportunity to bring clarity to this issue in future litigation.[20] If the *Oliver* case returns

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[20] Petitioners do not ask the Court to grant the petition, vacate the Eleventh Circuit's opinion in *White*, and remand the case for further proceedings in light of *Glenn*, and with good reason. *Glenn* was decided before the decision below, the existence of *Glenn* was brought to the court's attention, and the Eleventh Circuit expressly addressed *Glenn* in its opinion.

to the Eleventh Circuit after entry of final judgment, the record will have been perfected for appellate review, providing a vehicle for the Eleventh Circuit to elaborate on its view of whether the manner in which the Coca-Cola Plan is funded creates a conflict of interest. There is no reason for this Court to intervene in the current unsettled state of affairs.

II. It Would Be Premature for This Court to Revisit the Conflict Issue Less Than Nine Months After Issuing Its Decision in *Glenn*.

A. This Court Addressed Distinct, But Related, Issues in *Glenn* and the Circuits Should Have Time to Evaluate the Impact, If Any, of *Glenn* on the Issues Here.

Glenn involved an insured plan, where a third-party insurance company was granted discretion to decide disability claims and had accepted responsibility to pay benefits out of <u>its</u> (rather than the plan sponsor's) own assets. *Glenn*, 128 S. Ct. at 2346 ("The plan grants MetLife (as administrator) discretionary authority to determine whether an employee's claim for benefits is valid; it simultaneously provides that MetLife (as insurer) will itself pay valid benefit claims."). The Court analogized that arrangement to the situation that existed in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), where an employer administered its own self-funded plan—both deciding claims and paying benefits directly out of its operating assets. *See Glenn*, 128 S. Ct. at 2348 (discussing *Firestone*). *Glenn* noted that a conflict of interest is clear in both of those instances because "'every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . .

is a dollar in [the employer's] pocket.'" *Id.* (quoting *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987)). When a plan is unfunded and payments are made directly from the administrator's pocket, the Court recognized that "[t]he employer's fiduciary interest may counsel in favor of granting a borderline claim while its immediate financial interest counsels to the contrary." *Id.* (emphasis added).[21] But this Court in *Glenn* had no occasion to address, let alone decide, whether this "immediate financial interest" remains where the employer has established and funded an irrevocable trust from which any benefits will be paid, with no immediate consequence to the employer's "pocket." Moreover, it is hard to imagine that the Court would have intimated a view on that distinct question without addressing the substantial circuit precedent addressed to that very issue.

Indeed, in *Glenn*, the Court dealt primarily with how to weigh a conflict of interest once it has been found to exist, not how to determine whether a conflict exists in the first instance. The Court quickly determined that, whether it is an employer or an insurance company, an ERISA plan administrator that "both determines whether an employee is eligible for benefits and pays benefits out of its own pocket" operates under a conflict of interest. *Glenn*, 128 S. Ct. at 2348. The Court then got down to determining

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[21] Indeed, a review of the full sentence of the Third Circuit's *Bruch* opinion that this Court quoted in *Glenn* is telling: "Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Bruch*, 828 F.2d at 144 (emphasis added).

"how" that conflict should bear upon the amount of judicial deference given the administrator's decision, the issue that received most of the Court's analytical focus and the issue about which the members of the Court had fundamental disagreements.[22] *Glenn* simply did not provide this Court occasion to analyze the issue on which petitioners seek a writ of certiorari: whether a plan administrator that decides claims but does not pay benefits directly out of its own pocket nevertheless operates under a conflict.

B. The Circuit Courts Should Be Given an Opportunity to Determine Whether *Glenn* Impacts Their Prior Decisions Concerning Conflicts of Interest.

Despite the fact that *Glenn* focused on distinct issues, the Ninth Circuit recently interpreted *Glenn* as reinforcing its own view that a fully funded, irrevocable trust does not eliminate a plan administrator's "immediate financial interest" in denying claims and the attendant conflict of interest, and as calling into question the contrary view of other circuits. *See Burke v. Pitney Bowes Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1025-26 (9th Cir. 2008) (discussing *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848, 856 (11th Cir. 2007); *Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 282-83 (3d Cir. 2005); and *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1191-92 (4th Cir. 1989)). The Ninth Circuit vastly overreads the significance of

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[22] In fact, although four separate opinions were filed in *Glenn*, every member of the Court expressed agreement with the majority's reasoning and conclusion that insurance companies that both administer ERISA plans and pay benefits directly from their own pockets operate under a conflict of interest.

Glenn, but in all events the other circuits should be given more time to access the impact of *Glenn*, if any, on this discrete issue.

Petitioners rely on *Burke* to contend that there is a split of authority among the circuits concerning whether a conflict of interest exists where ERISA benefits are funded from an irrevocable trust. But petitioners are way ahead of themselves; the only disagreement that exists is that between the rule recently adopted by the Ninth Circuit in *Burke* and the views expressed in pre-*Glenn* decisions from other circuits—circuits that have not had the opportunity to revisit (or in the Eleventh Circuit's case, reconcile) the issue for themselves in light of the analysis in *Burke*. Indeed, even *Burke* makes clear that, prior to *Glenn*, the circuits had unanimously agreed "that there is no conflict of interest when plan benefits are paid out of a trust." *Burke*, 544 F.3d at 1025-26 (citing *Gilley*, 490 F.3d at 856; *Vitale*, 420 F.3d at 282-83; and *de Nobel*, 885 F.2d at 1191-92). It would be premature to conclude that there is a split of authority concerning the impact of *Glenn* at this juncture.

Other Circuits should be permitted to fully consider *Glenn*, and *Burke's* reading of *Glenn*, and decide for themselves whether *Glenn* signals a sea change in the law concerning conflicts of interest in ERISA cases that involve the payment of benefits from an irrevocable trust.[23] Eventually, circuits will either

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[23] Of course, the Eleventh Circuit below considered the impact of *Glenn* and viewed it as primarily affecting judicial review when there is a conflict, not the anterior question of whether a conflict exists. Whether that will emerge as the Eleventh Circuit's

agree with the Ninth Circuit's conclusion in *Burke* or they will conclude that the Ninth Circuit has overread *Glenn*. If the former scenario plays out, the split of authority that petitioners predict would be avoided completely. And if the latter situation occurs, then it is possible that the Ninth Circuit could reconsider its own view *en banc*. In all events, it would clearly be premature for the Court to weigh in just nine months after *Glenn* on the question of whether it enacts the major change in approach that the Ninth Circuit perceived.

III. Nor Is There Reason for This Court to Revisit the Conflict Issue Precipitously Because the Decision Below Is Correct.

Finally, there is no need for this Court to rush to revisit the conflict issue because the decision below is correct. Before *Burke*, every circuit to consider the issue had determined that the payment of ERISA benefits from an irrevocable trust removes the immediate financial interest (and hence conflict) that arises where an administrator pays claims out of its own general assets. *See Gilley*, 490 F.3d at 856; *Vitale*, 420 F.3d at 282-83; *de Nobel*, 885 F.2d at 1191-92. Although a panel of the Ninth Circuit has read *Glenn* as supporting the contrary view, that is a misreading of the decision. Indeed, as discussed above, *Glenn* involved an insurance company that paid benefits from its own pocket, not an employer that paid benefits from a trust.

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definitive view or simply a reaction to the parties below will be determined in *Oliver* or in subsequent cases.

The pre-*Burke* circuit law examining the issue uniformly and correctly recognized an important distinction between plan administrators that pay benefits from their own pocket, and those that pay benefits from a fully funded trust. For example, in *Vitale v. Latrobe Area Hospital*, the Third Circuit—in an opinion written by Judge Becker and joined by then-Judge Alito—held that an employer that administers its own ERISA plan does not operate under a conflict of interest if it funds those benefits out of a separate trust fund. *Vitale*, 420 F.3d at 283. In doing so, the *Vitale* court noted that prior Third Circuit decisions had "specifically distinguished between *insurance companies* that both administer and fund plans from *employers* who perform those roles." *Id.* at 282 (emphasis in original). That distinction was based, the *Vitale* court explained, on the fact while "[i]nsurance companies pay plan benefits out of funds that would otherwise be available as profits," employers did not necessarily do so—employers sometimes paid benefits "from a separate ERISA trust fund." *Id.* In that latter circumstance, the *Vitale* court noted that the employer, unlike the insurer, "'incurs no direct expense as a result of the allowance of benefits, nor does it benefit directly from the denial or discontinuation of benefits.'" *Id.* (citations omitted).

There is simply nothing in this Court's *Glenn* opinion, which involved the distinct context of insurance companies serving dual roles, that requires the new direction taken by the Ninth Circuit in *Burke*. Accordingly, and particularly in light of the unanimity of pre-*Glenn* circuit law, petitioners' passing reference to the alternative remedy of summary reversal is wholly misplaced.

IV. There Is Complete Agreement Among the Circuits on the Second Question Presented and This Court's Plenary Review Is Not Warranted.

The second question on which petitioners seek a writ of certiorari—whether a choice of law provision in an employee benefit plan can be enforced where its application would conflict with ERISA—does not warrant this Court's review because the circuits have unanimously and correctly rejected petitioners' position, and there is no conflict to be resolved by this Court. In this case, petitioners sought to enforce a choice of law provision in order to obtain application of the doctrine of *contra proferentem* under Georgia insurance law. (Specifically, petitioners sought conclusive application of the doctrine such that any ambiguity in an exclusion from coverage in an insurance policy makes that exclusion unenforceable as a matter of law.) But, as the Eleventh Circuit explained in its decision, petitioners' position was inconsistent with established precedent. Under well-settled Eleventh Circuit law, *contra proferentem* applies in ERISA cases, but only during the first step of the analytical framework, where the question is whether the interpretation at issue is *de novo* wrong. If so, and the plan document affords the plan administrator deference, the *de novo* wrong interpretation is still reviewed for reasonableness, but *contra proferentem* falls away, because "[t]he 'reasonable interpretation' factor and the arbitrary and capricious standard of review would have little meaning if ambiguous language in an ERISA plan were construed against the [plan administrator]." *White*, 542 F.3d at 857 (quoting *Cagle v. Bruner*, 112 F.3d 1510, 1519 (11th Cir. 1997)). Thus, the Eleventh

Circuit rejected the conclusive application of *contra proferentem* that petitioners urged because use of that doctrine beyond the first step of the analysis would conflict with the Eleventh Circuit's well-settled ERISA jurisprudence. In doing so, the Eleventh Circuit noted that, "when a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law." *Id.* (quoting *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1142 (11th Cir. 2001)).

Despite this, petitioners contend that "the Eleventh Circuit . . . did not address what happens under federal common law when there is a choice of law provision."[24] But while the Eleventh Circuit may not have addressed the issue to petitioners' satisfaction, the issue petitioners raised had already been resolved in *Buce*, where the Eleventh Circuit held that even where an ERISA plan expressly chooses state law, that law will not be applied if its use would be "inconsistent with the language of ERISA or the policies that inform that statute and animate the common law of the statute." *Buce*, 247 F.3d at 1148. Below, the Eleventh Circuit applied that principle and recognized that the use of *contra proferentem* beyond the first step in the analysis would undermine its prior ERISA decisions.

Petitioners do not and cannot identify a circuit split as to whether a choice of law provision can be enforced where it would require conclusive application of the

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[24] Petition at 7.

doctrine of *contra proferentem* in ERISA cases.[25] That is because every circuit to examine that issue has agreed with the Eleventh Circuit. *See Morton v. Smith*, 91 F.3d 867, 871 n.1 (7th Cir. 1996) (refusing to enforce choice of law provision where doing so would result in application of the doctrine of *contra proferentem* to conclusively resolve ambiguities in an ERISA plan); *Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785, 791 (8th Cir. 1998) (same). Indeed, in *Buce* the Eleventh Circuit used these prior circuit precedents as examples of cases that "illustrate[] a circumstance in which a court found that application of a particular state law rule, even if agreed to by the parties, would not be compatible with the law of ERISA." *Buce*, 247 F.3d at 1149 n.6.

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[25] Petitioners suggest that there is a circuit split warranting this Court's review because they read the Ninth Circuit's decision in *Wang Labs., Inc. v. Kagan*, 990 F.2d 1126 (9th Cir. 1993), to hold that, unless doing so would be "unreasonable or fundamentally unfair," a choice of law provision in an ERISA plan must be enforced—even if it conflicts with the federal common law of ERISA. (Petition at 7.) But *Wang Labs* does not stand for that proposition. Indeed, although the *Wang Labs* court enforced a choice of law provision in an ERISA plan and applied Massachusetts' six-year limitations period for contact actions in a case involving claims for benefits, it did so only after recognizing that "[s]ince ERISA does not supply a statute of limitations [for benefits claims], it cannot preempt the applicable state law statute of limitations." *Wang Labs*, 990 F.2d at 1128. Thus, *Wang Labs* did not involve a situation where, like here, state law conflicted with ERISA or the federal common law applying it. Thus, the Ninth Circuit's decision in *Wang Labs* is entirely consistent with the Eleventh Circuit's precedent—both courts recognize that, even where there is a choice of law provision, state law can only be enforced where doing so does not conflict with "the language of ERISA or the policies that inform that statute and animate the common law of the statute." *Buce*, 247 F.3d at 1148.

Finally, even if *contra proferentem* were available after the first step of the analysis in this ERISA case, petitioners' claims would still fail as a matter of law. Even a cursory review of the extrinsic evidence considered by the Committee demonstrates that the Plan's Offset Provision was intended to permit offsets. The doctrine of *contra proferentem* does not come into play where an ambiguity can be resolved by extrinsic evidence. *See Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1194 (11th Cir. 2001) (*contra proferentem* "is something of a fallback canon, and the foremost goal of contract construction is to give effect to the intent of the parties") (internal quotation and citation omitted); *Barnett v. Ameren Corp.*, 436 F.3d 830, 834 n.2 (7th Cir. 2006) (*contra proferentem* "is applied, if at all, after a contract is deemed ambiguous and after extrinsic evidence fails to cure the ambiguity") (citation omitted). Accordingly, granting a writ of certiorari on the second question would serve no practical purpose because, even if the choice of law provision is enforced and the doctrine of *contra proferentem* is applied, petitioners' claims would still be subject to dismissal on an independent basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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